(2014) 03 P&H CK 0007

In the Punjab And Haryana At Chandigarh

Case No : C.A. No. 547 of 2009 in C.P. No. 82 of 1998

IDBI Trusteeship Services Ltd. APPELLANT

Vs

Chattar Industries Ltd. and Others RESPONDENT

Date of Decision : 11-03-2014

Acts Referred:
Companies Act, 1956 — Section 125, 132

Citation : (2015) 188 CompCas 238

Hon'ble Judges : Rajiv Narain Raina, J

Bench : Single Bench

Advocate : Munish Jain and C.S. Pasricha, Advocates for the Appellant

Judgement

Rajiv Narain Raina, J.—IDBI Trusteeship Ltd., is before this court in Company Application No. 547 of 2009 in Company Petition No. 82 of 1998. I heard learned counsel for the parties at length and reserved judgment. My view of the case is as follows: Facts first.

2. Company Application No. 547 of 2009 has been filed under rule 9 read with rule 163 of the Companies (Court) Rules, 1959, for bringing on record the fact that the applicant is engaged in debenture trustee business and its work has been transferred to ITSL and is, therefore, a secured creditor holding pari passu charge with the other secured creditors, i.e., the Industrial Development Bank of India, IFCI Ltd., and the Haryana Financial Corporation, Sector-17, Chandigarh and has right on disbursal of moneys and for re-distribution of sale proceeds with respect to the first respondent-company (in liquidation), i.e., M/s. Chattar Industries Ltd.

3. The applicant claims to be a secured creditor along with others for the reason that it holds a charge on the property of the company (in liquidation) duly registered under section 125 of the Companies Act, 1956, with the Registrar of Companies and has pari passu right with the other secured creditors. The claim is based on a letter dated May 18, 1995, exchanged between IDBI and M/s.

Chattar Industries Ltd., the effect of which will be examined and adverted to later at the appropriate place of the judgment.

4. The grievance is that interim disbursal to the secured creditors was done behind the back of the applicant by classifying its claim in the list of unsecured creditors. The prayer made before this court is that by treating the applicant as a first charge holder and secured creditor, the excess amounts disbursed to the IDBI, HFC and IFCI deserve to be recalled and the correct distribution ratio be applied for defraying liabilities of the first respondent M/s. Chattar Industries Ltd., owed to it.

5. The short controversy involved in this application is whether the applicant has a registered charge under section 125 of the Companies Act, 1956, after procedure prescribed was followed leading to registration of Form 8. The claim is based on a trusteeship agreement dated November 3, 1995, drawn between the applicant and the IDBI.

6 Mr. C.S. Pasricha, learned counsel appearing for the applicant has drawn the attention of this court to an internet download from the website of the Ministry of Corporate Affairs, Government of India dated September 1, 2010, in the name of "Chhatar Industries Ltd." which shows the filing date of the charge as November 20, 1995 and "EVE" date as November 3, 1995, against diary No. 147219 and receipt No. 108783 for Form 10 standing against Sr. No. 25. He has also pointed out to annexures A15 and A16 which are photocopies of receipts issued by the Department of Company Affairs, Registrar of Companies Cash Counter Receipt, Office of the Registrar of Companies, New Delhi and Haryana in the name of Chhatar Industries Ltd. A15 is relied on to prove that Form 10 and Form 13 were submitted against cash payment of Rs. 120 and Rs. 10 respectively. The receipt is dated November 20, 1995. A16 is a similar receipt dated December 29, 1995, of the company in liquidation from which it is sought to be proved that Form 8 was submitted on December 29, 1995 and cash payment of Rs. 120 was made to the Registrar of Companies. The text of Form 13 is at annexure A8 in which it is typed against the column of date and description of the instrument creating the charge--November 3, 1995.

7. The affidavit of the Assistant Registrar of Companies, NTC of Delhi and Haryana, Ministry of Corporate Affairs, New Delhi was filed before this court on November 30, 2012. It has been sworn in paragraphs 6 and 7 of the affidavit as follows:

"6. That the deponent humbly submits that all efforts were and are being made to trace out the document file of the company (in liquidation), but the same could not be traced out. However certain documents of the company (in liquidation) are available in the document file of Chhatar Chemicals Ltd. The situation so being, the office of the deponent is not in a position to confirm as to whether the certificate was issued in respect of the aforesaid receipt No. 108783, dated November 20, 1995, for Forms 10 and 13 and Receipt No. 127121, dated

December 29, 1995, for Forms 8 and 13 or not. It is submitted that only on the basis of NIC filing details, it can only be ascertained that both the receipts belong to the company (in liquidation), having ON No. U74900DL1985PLC022861 and have been issued by this office and whether the same are registered also cannot be ascertained.

7. That it would be very pertinent to add that during the time of NIC filing, the company had to file Forms 8 and 13 in triplicate for creation/modification of charge with the ROC offices. One copy of Forms 8 and 13 was kept with the Registrar of Companies office by pasting a copy of the receipt containing the details of the documents and filing fees and the other two copies of the said forms, one being for the bank/financial and the other for the company were returned to the applicant with copies of the receipts. The respective Form 8 goes in the documents file of the company and Form 13 was kept separately and a date wise register was maintained. Similarly Form 17 for satisfaction of charges were also debt with.

It will further be relevant to add here that I view of the aforesaid procedure the banks/financial institutions are bound to have a copy of the charge and/or registration/modification of charge as explained above, more so without a copy of the charge, the same cannot be satisfied as per the provisions of law. As such it is humbly submitted that the banks and financial institutions be kindly directed to produce the said documents, in view of the submissions made."

8. Mr. Kamal Sehgal, learned counsel appearing for HFC submits that registration of a charge on property of a company in liquidation requires the positive act of registration in accordance with section 125 of the Companies Act, 1956 and in case, it is not so, neither proof furnished, nor concrete evidence shown to exist on record, it cannot then be said that there is a charge created in the eyes of law. Moreover, the applicant has not raised any dispute with the Registrar of Companies with respect to registration of the charge or that due procedure was followed by filling in Forms 8 and 13, etc., and filing them within the time frame of 30 days and that the Registrar of Companies did not act in accordance with law or was at fault in not registering the charge under section 132 of the Act when law required him to do so. He submits that a certificate of registration of creation of charge is not issued where the Registrar of Companies finds defects in the document filed by the company for registration of charge or is delayed beyond 60 days then condonation of delay can only be at the hands of the Company Law Board. For this, Form 21 is to be submitted. Unless delay is condoned the charge is not registered and taken on record.

9. The applicant argues that because IDBI wrote a letter to M/s. Chattar Industries Ltd., for pari passu treatment it is, therefore, bound by the letter and it should be taken that IDBI agreed that charge be created on the property of the company in liquidation.

10. Mr. Pasricha has taken me through the pleadings contained in paragraph 7 of

the application. It has been stated therein that the charge of ITSL successor-in-interest of the IDBI in pursuance to regulation 13A of the Securities and Exchange Board of India (Debenture Trustees) (Amendment) Regulations, 2000, the IDBI was prohibited from acting as trustees and the debenture trustee business was transferred from IDBI to ITSL. ITSL as such was also as a secured creditor and the action of treating the claim of the applicant as an unsecured creditor was uncalled for and the said factum was not even communicated to the applicant earlier than letter dated August 4, 2009 and that too in response to the letter written by the applicants demanding to know of the fate of their claim which the official liquidator was duty bound to have communicated to it at the first possible instance.

11. In this manner, it is urged that the applicant was wrongfully treated by the official liquidator as an unsecured creditor and such declaration is illegal and deserves to be undone and the sale proceeds redistributed by assuming that the applicant is a secured creditor.

12. In Indian Bank Vs. The Official Liquidator, Chemmeens Exports (P) Ltd. and Others, , the interpretation placed on section 125 of the Act emerges from paragraph 7 of the judgment and the same reads as under (page 82 of 93 Comp Cas):

"On a plain reading of sub-section (1) it becomes clear that if a company creates a charge of the nature enumerated in sub-section (4), after the 1st day of April, 1914, on its properties, and fails to have the charge together with instrument, if any, by which the charge is created, registered with the Registrar of Companies within thirty days, it shall be void against the liquidator and any creditor of the company. This, however, is subject to the provisions of Part V of the Act. The proviso enables the Registrar to relax the period of limitation of thirty days on payment of specified additional fees, on being satisfied that there has been sufficient cause for not filing the particulars and instrument or a copy thereof within the specified period. Sub-sections (2) and (3) deal with repayment of money secured by the charge. Sub-section (2) provides that the provisions of sub-section (1) shall not prejudice the contract or obligation for repayment of money secured by the charge and sub-section (3) says that when a charge becomes void under that section, the money secured shall become payable immediately. Though as a consequence of non-registration of charge under Part V of the Act, a creditor may not be able to enforce the charge against the properties of the company as a secured creditor in the event of liquidation of the company as the charge becomes void against the liquidator and the creditor, yet he will be entitled to recover the debt due by the company on par with other unsecured creditors. It is also evident that section 125 applies to every charge created by the company on or after the first day of April, 1914. But where the charge is by operation of law or is created by an order or decree of the court, section 125 has no application."

13. Mr. Sehgal also relies on the judgment in Des Raj, Voluntary Liquidator Vs.

Punjab Financial Corporation, , which is to the same effect.

14. He further relies on a judgment of the learned single Bench of this court in CA. No. 19 of 1997 rendered on January 12, 2007, speaking through M.M. Kumar J. on the issue of registration of charge under sections 125 and 132 of the Companies Act. The court upheld the order of the official liquidator declining to accept the plea of the Haryana Financial Corporation that it had failed to register the charge over the properties of the company in liquidation in accordance with the requirements of section 125 of the Act by furnishing particulars of the charge and depositing the instrument, if any, by which the charge was created, within the prescribed period of 30 days from the date of its creation or within the extended period contemplated by law. The view of the learned single judge has been upheld in Company Appeal No. 17 of 2007 by the order dated, April 27, 2007.

15. To give due credit to Mr. Pasricha this court notices the decision cited by him reported as State Bank of India Vs. Depro Foods Ltd. and Others, in which R.N. Mittal J. of this court took the following view (page 383):

"The question now to be seen is that if the particulars of the charge in Form 8 have been submitted by the charge holder to the Registrar and no defect is pointed out by him in the particulars, whether the charge is deemed to be registered, though it has not been in fact registered. It is not necessary to elaborate on the point as a similar matter came up before me in Haryana Financial Corporation v. Depro Foods P. Ltd. (Company Petitions Nos. 34 and 35 of 1981, decided on December 3, 1981), and State Bank of India Vs. Haryana Rubber Industries P. Ltd. and Others, : State Bank of India Vs. Haryana Rubber Industries P. Ltd. and Others, , wherein it was held that the Registrar is duty bound to convey the objections in the particulars of the charge to the charge holder so that those can be removed by him. The duty of the charge holder is to send the particulars of the charge in Form 8 along with relevant instrument and if the charge is not registered by the Registrar, then the former cannot he held responsible for that. The reason is that after the particulars, etc., have been filed by the charge holder, he is absolved from his duty and the responsibility of registration shifts on to the Registrar. Consequently, I decide the matter in favour of the plaintiff and hold that all the charges of the plaintiff shall be deemed to have been registered, though they have not in fact been registered."

(underlined Here Printed In italics for emphasis)

16. A reasonable sequitur is that Form 8 must be submitted by the charge holder complete in all respects within the time prescribed for the onus to shift on the Registrar and for the presumption to arise. The ratio of the judgment is based on the application of the no fault theory and operation of deeming fiction by shifting of responsibility. But this is not the case here on facts and thus the judgment is of no help to the applicant and is distinguishable. I do not therefore find any substance in the present application sufficient to interfere and would dismiss the

same for the reason that the applicant has failed to prove that its charge on the assets of the company in liquidation was duly registered to classify it as a secured creditor. The letter relied upon does not in my view take the case of the applicant to its goal that it had a registered charge on property and should be treated as one falling in the company of secured creditors for this court to order redistribution of money.